No. 5751

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United States Circuit Court of Appeals

For the Ninth Circuit

KARL HERTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION OF APPELLANT FOR REHEARING

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Filed.....1929

.....Clerk.

FILED
JUL 23 1929
PAUL P. O'BRIEN,

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Now comes Karl Herter, appellant, and respectfully petitions for a rehearing for the reasons:

1. That the decision is in conflict with:
   United States v. Elliott, (C. C. A. 9th), 5 F. (2d) 292
   United States v. Napela, 28 F. (2d) 898
   Doran v. U. S., (C. C. A. 9th), 31 F. (2d) 754

2. That the decision fails to distinguish between the statutory rights granted appellant by Sections 625 and 626 of Title 18 U. S. C. A. for relief before the commissioner issuing the warrant and the constitutional guarantees of the Fourth and Fifth Amendments to the Federal Constitution which guarantees must be asserted before the district court.

   United States v. Napela, 28 F. (2d) 898 at p. 903
   United States v. Ephraim, 8 F. (2d) 512 at p. 513

Argument and Authorities

This court in its opinion says,

> "that inasmuch as the Espionage Act purports to confer on a commissioner not the power to quash the warrant or to suppress the evidence but only to make disposition of the property, it is inoperative within the realm of the Prohibition Act."

In United States v. Elliott, 5 F. (2d) 292 at p. 294 this court, in construing the provisions of the Espionage Act in an intoxicating liquor case, said:

> "These several sections and provisions are explicit, and when construed in connection with the Fourth Amendment, they not only define the limits of the power of the commissioner in issuing a search warrant, but they also clearly imply that one may go before the commissioner and controvert the grounds upon which the warrant was issued, and, if it appears that the property or paper which has been seized is not that which was described in the warrant, or that there was no probable cause for believing the existence of the grounds upon which the commissioner issued the warrant, may have such property or paper restored to him by order of the commissioner.
>
> "Appellant herein advances no sufficient reason for not having followed the course outlined. He therefore makes no cause for the issuance of a writ of certiorari."

In the recent case of United States v. Napela, (D. C.) 28 F. (2d) 898 the court said:

> "It is apparent from sections 625 and 626 that their purpose, apart from the later limitations of the Prohibition Law, is to give persons from whom things are seized under a search warrant prompt remedies in the preliminary stages, viz: * * * and (2) a deter-

mination by the commissioner that the things seized were not intended to be seized, or were not lawfully seized, and that, therefore, *no evidence thereof can be offered by the government on the examination of the defendant before him, or any other commissioner before whom the case may be brought, on the criminal charge, if any, based on the possession of the seized articles.* * * *

"If the powers granted in sections 625 and 626 were not given to the commissioner who issued the search warrant, the accused could not have the return of property, either that not intended to be seized, or that unlawfully seized, or a determination by the commissioner, on the examination by him or by any other commissioner before whom the defendant may be taken, whether the seized articles were competent or incompetent evidence against him.

"True, application may be made to the court, as hereinafter shown, and the court can determine the legality of the seizure and the competence of the seized articles as evidence for the trial of the accused; *but this may be done only when a court is in session,* and, in the meantime, the accused might unjustly languish in jail, awaiting a term of the court, because of the inability of the defendant to furnish bail or inability to have the evidence against him on the examination before the commissioner confined to competent evidence.

"It is true that power to take proof on the question of probable cause for the issue of the search warrant and to quash the warrant is not given to the commissioner in the issuance of search warrants under any other provision of law, viz. to search for counterfeit money, smuggled goods, or property used for violation of the internal revenue laws.

"These are, however, statutes of long standing, and the search is limited to specific articles or kinds of

articles. Title 18 (U. S. C. A. §§611-633) was enacted as the Espionage Act of June 15, 1917, just after the United States entered into the World War. The statement of articles for which search might be made under the Espionage Act was very broad, and covered, among other things, any property or papers which might be used to aid a foreign government. The very breadth of the power of search under the Espionage Act doubtless caused the remedial provisions of sections 625 and 626 of title 18 to be given place in the act.

"The power of the commissioner, given to him in section 626 to title 18 (section 16, title 11 of the Espionage Act), to order the restoration of the seized articles, has been taken from him, so far as the restoration of intoxicating liquors is concerned, by title 2, §25, of the National Prohibition Act, which provides that such liquors shall be held 'subject to such disposition as the court may make thereof.' (citing cases)

"This leaves the power of the commissioner confined to only one of the two things he could otherwise determine, viz. the competency of the seized goods as evidence before him, or any other commissioner, on the examination of the defendant upon the charge of unlawful possession of intoxicating liquors under the Prohibition Law. *That the power of the commissioner to take proof of probable cause under these sections, as limited by section 25 of the National Prohibition Law, relates only to the use of the seized liquors as evidence by the government against the defendant for violation of the National Prohibition Laws, must be evident, for it can have no other purpose.* (citing case)." (Italics ours.)

In United States v. McKay, (D. C.) 2 F. (2d) 257, the court said at pp. 258,259:

> "A person from whose possession property is taken in execution of a search warrant has the undoubted right to avail himself of the remedies provided in sections 15 and 16, title 11, of the Espionage Act, in so far as they are not modified or withdrawn by section 25, title 2, of the National Prohibition Act provided he acts with reasonable diligence, and before the court takes jurisdiction."

In the instant case appellant acted promptly. He filed his petition for remission and leave to controvert on Oct. 9, 1928, (R. p. 25), being four days after the search (R. p. 21), only one day after filing of the search warrant and return (R. pp. 17, 19, 22) and *twenty-two days before* the jurisdiction of the district court attached by the filing of the information therein (R. p. 1).

In United States v. Ephraim, 8 F. (2d) 512 at p. 513, in construing the provisions of the Espionage Act, the court said:

> "It is true that section 16 contains provisions inconsistent with the Volstead Act, but they provide one of the steps required to be taken if the grounds on which the search warrant is issued are controverted. The claimant or person from whom the property is seized is given a day in court, the warrant in the first instance being issued ex parte, and *has the right to the independent judgment of the commissioner issuing the warrant if desired. The judge,* who may be called upon later to try offenders from whom the seizure was made, *cannot substitute his judgment on a question of fact so raised for that of the commissioner.*" (Italics ours.)

Evidence Excluded

This Court in its opinion says,

> "appellant has not brought here his petition to quash or *any part of the evidence taken* thereon but has incorporated in the record the commissioner's 'Report * * and Ruling'."

The findings, conclusions, ruling and decision of the commissioner were in appellant's favor. The government appeared before the commissioner. It did not question his jurisdiction. It submitted to his jurisdiction and produced its witnesses and evidence. The government saved no exception to the ruling and decision of the commissioner. It perfected no appeal therefrom. It asked for no review of the proceedings. At the trial in the district court the government did not introduce nor even offer the testimony taken at the hearing before the commissioner.

Why should the appellant incorporate, in his record to this Court, the testimony upon which the commissioner's order was based? Why should appellant appeal from an order, in his favor, made by the commissioner?

In the recent case of Doran v. United States, (C. C. A. 9th), 31 F. (2d) 754 this court said:

> "A motion seasonably made for the suppression of part of the evidence on the ground that it was obtained through an unlawful search, was heard upon affidavits and oral testimony prior to the trial, and denied. *The testimony so adduced is not brought here by bill of exceptions or otherwise and the order is therefore not open to review.*" (Italics ours.)

The review of an order *granted* rests on no different grounds or record than the review of an order *denied.*

The government should have excepted to the commissioner's order if improper and should have shown to the

district court wherein the order was not supported by the sworn testimony taken before the commissioner.

In U. S. v. Napela (D. C.) 28 F. (2d) 898 the court said:

> "When a person is granted a right to be asserted in a tribunal, and he neglects to assert that right while before such tribunal, he must be deemed to have waived that right. This should also be so when a person is granted a right to be asserted before a quasi judicial officer vested with certain judicial discretion, and fails to assert that right while before such officer. Such a right is a statutory right, irrespective of its duration and may undoubtedly be waived like other statutory 'rights'."

Again in the Napela case:

> "The statutory rights granted by sections 625 and 626 must not be confused with the constitutional guarantees of the Fourth and Fifth Amendments to the Federal Constitution. Sections 625 and 626 were not enacted until 1917, but the rights granted by the Fourth and Fifth Amendments have existed since the adoption of these amendments. It is the duty of the courts to enforce these constitutional rights, *but the commissioner has no power in respect thereto.*" (Italics ours.)

In the instant case it must be remembered that appellant Herter was asserting before the commissioner a statutory right accorded him by sections 625 and 626 of title 18, U. S. C. A.

The district judge excluded as "immaterial and incompetent" (R. p. 67) the offered order of Judge Pray and the findings of fact and conclusions of the commissioner (R. pp. 66, 67). Neither were admitted in evidence by the district court.

The testimony on which the commissioner's findings and conclusions are based was not offered by the government nor was it incorporated in the bill of exceptions or record brought to this court.

Can this court, without having before it a scintilla of the evidence or testimony offered at the commissioner's hearing hold that,

> "The commissioner excluded from his consideration entirely all evidence of the reputation of the place."

The trial court based his exclusion of the commissioner's ruling on no such grounds as the foregoing.

Oft times the testimony is much stronger and more convincing than it appears from the brief resume thereof set forth in the opinion of the commissioner or judge who considered same.

As was said in United States v. Madden, 297 Fed. 679 cited by this court in its opinion,

> "as in the case of master, referee, or other ministerial officer of the court, the conclusions of the commissioner should be upheld, unless clearly wrong."

No Rebuttal Testimony

In the opinion this court says:

> "Two prohibition agents testified that at all times mentioned the residence bore the common reputation of being a place where intoxicating liquor was sold and one witness, an attorney for appellant, *testified in rebuttal* on this point.

The writer hereof is the attorney referred to. He did not testify *in rebuttal*. There was no rebuttal testimony offered.

The record shows that the government offered the testimony of three witnesses in support of its case viz. Roberts, Jones and Adair (R. p. 44), that two of these government witness testified that the dwelling has the reputation of being a place where liquor is sold and that the third witness,

> "called by the United States District Attorney as a witness, testified that the place has not had such a reputation since June, 1928, and that the reputation of the place is good." (R. p. 48).

The United States District Attorney saw fit to call the witness Adair without subpoena, warning or notice to the witness. The government impliedly vouched for his veracity and asked that the commissioner accept and believe his testimony. This the commissioner did.

Under these circumstances can the government complain if the commissioner sees fit to believe the testimony of this one government witness and to disbelieve the testimony of the other two witnesses offered by the government?

Can it be justly said that in this state of the record the commissioner committed a breach of his duty as an officer by

> "excluding consideration of testimony touching reputation and erroneously holding that the warrant affidavit was directly contradicted by twelve witnesses"?

Reputation of Private Dwelling

One may not obtain a search warrant for a private dwelling by filing an affidavit that the dwelling has the *reputation* of being a place where liquor is sold.

In United States v. A Certain Distillery, 24 F. (2d) 557

at pp. 558, 559 in speaking of section 25 of the Prohibition Act the court said:

> "The restriction in section 25 confines the issuance of warrants for the search of private dwellings to two specific instances, viz.: Where such dwelling is 'used for the unlawful sale of intoxicating liquor'; or where such dwelling is 'in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house."

In Bell v. United States (C. C. A. 9th) 9 F. (2d) 820, this court, considering the validity of a search warrant, said that,

> "it was confessedly void, because issued to search a private dwelling occupied as such without any proof that the dwelling was used for the unlawful sale of intoxicating liquor."

An unlawful sale of intoxicating liquor may not be shown by the reputation of the dwelling although such evidence would be admissible to support the charge of maintaining a nuisance therein.

See:

English v. United States, (C. C. A. 8th), 30 F. (2d) 518
Lambert v. United States, (C. C. A. 9th), 26 F. (2d) 773

In other words, *probable cause* is shown by a positive averment that affiant has first-hand knowledge that liquor was sold in the home and not by what reputation others may have given to the home.

See:

U. S. v. Berkeness, 48 S. Ct. 46, 72 L. Ed.
Wagner v. U. S. (C. C. A. 8th), 7 F. (2d) 861
Thompson v. U. S. (C. C. A. 4th), 22 F. (2d) 134
U. S. v. Boscarino, (D. C.) 21 F. (2d) 575
Proulk v. U.S. (C.C.A. 1st) 32 F. (2d) 760
U. S. v. Gokey. 32 F. (2d) 793

In the instant case unless Sharp actually purchased liquor in appellant's home there was no *probable cause* for the issuance of the warrant. See: Dickhart v. U.S. 16 F.(2d) 345

The government did not produce Sharp or cause any subpoena to issue for him or attempt to account for its failure so to do.

Appellant caused a subpoena to issue for Sharp and to be placed in the hands of the United States marshal for service but the marshal was unable to locate him. (R. p. 49).

Sharp did not and will not face appellant or appellant's witnesses. Sharp doubtless is familiar with the "sections declaring that a false oath in connection with the procuring of a search warrant shall be subject to the law of perjury" as is set forth in the opinion herein.

The testimony of Sharp, the alleged purchaser, would have been the best evidence the government could produce. It must, like any other litigant, produce its best evidence or satisfactorily account for its failure so to do. It may not hide its case behind a hidden accuser who will not face the accused or submit to cross examination.

Conclusion

No warrant shall issue for the search of a private dwelling occupied as such except upon *probable cause.*

See:

4th Amendment U. S. Constitution
Sec. 613 Title 18 U. S. C. A.

Under the National Prohibition Act a search warrant

may issue as provided in sections 611 to 631 and 633 of Title 18 U. S. C. A. being the Espionage Act of 1917.

See:

Sec. 39 Title 27 U. S. C. A.

A search warrant may be issued by a United States District Judge, a United States Commissioner, or a state magistrate.

See:

Sec. 611 Title 18 U. S. C. A.

Before the commissioner can issue a search warrant for a private dwelling he must first be satisfied and determine that *probable cause* exists for the issuance of the warrant.

See:

Secs. 614, 615, 616, Title 18 U. S. C. A.

Probable cause for the search of a private dwelling is shown in the first instance by proof of a sale or sales of intoxicating liquor in the dwelling.

See:

Sec. 39 Title 27 U. S. C. A.
U. S. v. A Certain Distillery, 24 F. (2d) 557 at pp. 558, 559.
Bell v. United States (C. C. A. 9th) 9 F. (2d) 820
U. S. v. Berkeness, 275 U. S. 149
Byars v. U. S. 273 U. S. 28

Can it be that a commissioner who has been misled into believing there was *probable cause* for the issuance of a search warrant cannot hear a party injured thereby who acts promptly in bringing the true facts to the attention of the commissioner?

Can it be that a commissioner has the power to find the *presence* of probable cause, but he has not the power to find its *absence?*

Has a commissioner no power to quash a search warrant which he has issued when, before a criminal prosecution is begun in the district court thereon, he finds that the true facts are not as first represented to him and that in truth and in fact no *probable cause* existed for the issuance of the warrant?

For the foregoing reasons appellant respectfully petitions for a rehearing herein.

Respectfully submitted,

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CERTIFICATE

This is to certify that the foregoing petition is, in my judgment, well founded, and I further certify that said petition is not interposed for delay.

Hugh R. Adair
Of Counsel BO.